A

JOHN NYUMBEI

v.

PP

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
[CRIMINAL APPEAL NO: Q-05-30-1997]

C

12 MARCH 2007

CRIMINAL LAW: *Penal Code - Section 300 - Murder - Insanity - Test for - Whether that of legal test as opposed to medical test - Acute psychotic disorder - Whether not 'insanity' in law - Absence of total impairment of cognitive functions - Whether fatal to defence of insanity - Penal Code, ss. 84, 300, 302*

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The appellant had admitted in his sworn statement to killing the deceased and severing the deceased's head, but had pleaded insanity pursuant to s. 84 of the Penal Code. In support of the defence, the appellant adduced evidence through DW2, a consultant psychiatrist, that he was suffering from 'acute psychotic disorder', *ie*, that he had not been in contact with reality and had suffered disturbances as to his way of thinking, perception and behaviour. The 'acute psychotic disorder' notwithstanding, DW2 confirmed that the appellant did not suffer from total impairment of cognitive functions, was coherent in his speech, and showed appropriate emotional responses when describing the incident of the crime. The learned trial judge, upon the evidence adduced, ruled that the appellant was not exempted from criminal liability, and hence convicted the appellant of murder and sentenced him to death. The appellant appealed and argued that the learned judge was wrong in rejecting his defence of insanity. It was further argued that learned judge did not properly explain the technical evidence of DW2 to the assessors, and by that had impeded the latter's capacity to understand the evidence and evaluate the issue of insanity as a defence.

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Held (dismissing the appeal)
Per Abdull Hamid Embong JCA:

(1) There is a distinction between the notion of legal insanity and that of medical insanity. Not every form of insanity exempts a person from criminal liability. Only legal insanity under s. 84 Penal Code provides that exemption. (para 13)

(1a) The specie of insanity addressed by s. 84 is one that impairs the cognitive faculties of a person. Its nature and extent must be that as to make the offender incapable of knowing the nature of his act, or that what he is doing is wrong or contrary to law. The criminality of an act must thus be determined by this test in s. 84 as distinguished from the medical test. (para 13)

(2) When the defence of insanity is raised, it is incumbent on the court to consider two matters, *viz*: (i) whether the accused person has established that at the time of committing the act he was of unsound mind; if so (ii) whether his unsoundness of mind was of a degree as to make him incapable of knowing the nature of his act as being wrong or against the law. In so doing, the court may also consider the circumstances which come after the crime. (paras 14 & 20)

(3) The total effect of DW2's opinion was that the appellant was not of unsound mind at the time he committed the offence. Indeed, the said expert's testimony showed that the appellant was capable of knowing the nature of his act as being against the law. In short, the appellant was not insane. Likewise, the appellant's act in disposing off the skull after severing the deceased's head showed a degree of guilt and an effort to avoid detection. (paras 19 & 20)

(4) The learned trial judge had in his summing up to the assessors properly defined and explained the law on insanity. His lordship also explained in clear terms the burden of proof required of the appellant in raising this defence. Further, the learned judge had recounted the evidence of DW2 to the assessors and had directed them to view the evidence as a whole to determine whether the prosecution

had succeeded in proving its case beyond reasonable doubt. The summing up, therefore, had been taken with great care and was impeccable and unimpeachable.

[Conviction and sentence affirmed.]

Bahasa Malaysia *translation of headnotes*

Dalam keterangan bersumpahnya perayu mengaku membunuh si mati dan memenggal kepala si mati, tetapi telah memplid pembelaan hilang akal di bawah s. 84 Kanun Keseksaan. Bagi menyokong pembelaannya, perayu mengemukan keterangan melalui DW2, seorang pakar sakit jiwa, bahawa beliau mengalami penyakit 'acute psychotic disorder', iaitu bahawa beliau tidak berpijak di dunia nyata dan wujud kecelaruan pada pemikiran serta persepsi dan tingkah lakunya. Namun begitu, DW2, dalam memperakukan penyakit 'acute psychotic disorder', telah mengesahkan bahawa perayu tidak mengalami kelumpuhan fungsi kognitif yang total, masih boleh bertutur dengan baik dan telah menunjukkan tindak balas emosi yang sewajarnya apabila menerangkan tentang kejadian yang berlaku. Yang arif hakim bicara, berdasarkan keterangan di hadapannya, mendapati perayu tidak terkecuali dari liabiliti jenayah, dan dengan itu telah mensabitkan perayu dengan kesalahan bunuh dan mejatuhkan hukuman mati keatasnya. Perayu merayu dan berhujah bahawa dalam halkeadaan kes yang arif hakim bicara khilaf dalam menolak pembelaan hilang akalnya. Dihujahkan selanjutnya bahawa yang arif hakim gagal memberi penjelasan sewajarnya kepada pengapit-pengapit mengenai keterangan teknikal DW2, sekaligus menjejaskan keupayaan pihak terkemudian tersebut untuk menilai isu hilang akal sebagai suatu pembelaan.

Diputuskan (menolak rayuan)
Oleh Abdull Hamid Embong HMR:

(1) Terdapat perbezaan antara fahaman hilang akal di sisi undang-undang dan fahaman hilang akal mengikut kaedah perubatan. Tidak semua bentuk hilang akal boleh mengecualikan seseorang dari liabiliti jenayah. Pengecualian sedemikian hanya diberi oleh hilang akal di bawah s. 84 Kanun Keseksaan.

(1a) Bentuk hilang akal yang diperkatakan s. 84 adalah hilang akal yang melumpuhkan terus fakulti kesedaran seseorang. Sifat dan tahapnya hendaklah sebegitu rupa sehingga menyebabkan pesalah tidak mampu mengetahui tentang sifat

perbuatannya, atau apa yang dibuatnya itu salah atau bertentangan dengan undang-undang. Kejenayahan sesuatu perbuatan dengan itu perlu ditentukan oleh ujian s. 84 ini dan bukannya melalui ujian perubatan.

(2) Apabila pembelaan hilang akal dibangkitkan, menjadi tanggungjawab mahkamah untuk mempertimbang dua perkara, iaitu: (i) sama ada tertuduh telah membuktikan bahawa ia hilang akal semasa melakukan perbuatannya; jika begitu (ii) sama ada kehilangan akal tersebut sebegitu rupa sehingga tertuduh tidak berupaya mengetahui sifat perbuatannya yang salah atau menyalahi undang-undang. Dalam mempertimbang semua ini, mahkamah boleh mengambilkira hal-hal keadaan lepas jenayah yang berlaku.

(3) Kesan menyeluruh pendapat DW2 adalah bahawa perayu bukanlah seorang yang hilang akal pada masa ia melakukan kesalahan. Malah, testimoni pakar ini menunjukkan bahawa perayu berupaya mengetahui sifat perbuatannya yang menyalahi undang-undang. Ringkasnya, perayu tidak hilang akal. Begitu juga, perbuatan perayu dalam membuang kepala si mati menunjuk kepada satu tahap kebersalahan dan merupakan satu usaha untuk mengelakkan penemuan.

(4) Yang arif hakim bicara, dalam kesimpulannya kepada pengapit-pengapit, telah menerang dan mentakrif dengan sewajarnya undang-undang mengenai hilang akal. Yang arif juga telah menerangkan dengan jelas beban bukti yang diperlukan dari perayu dalam membangkitkan pembelaannya tersebut. Selanjutnya, yang arif hakim telah menghurai keterangan DW2 kepada pengapit-pengapit dan mengarahkan mereka untuk menilai keterangan secara menyeluruh bagi menentukan sama ada pendakwaan telah membuktikan suatu kes di luar keraguan munasabah. Kesimpulan tersebut, dengan itu, dibuat dengan cara yang amat teliti dan tidak ada cacat celanya.

[Sabitan dan hukuman dikekalkan.]

Case(s) referred to:
Baharom v. PP [1960] 26 MLJ 249 ***(refd)***
Bhikari AIR [1966] sc. 7 ***(refd)***
Goh Yoke v. PP [1970] 1 MLJ 63 ***(refd)***
Juraimi Hussein v. PP [1998] 2 CLJ 383 CA ***(refd)***
Lim Guan Eng v. PP [1998] 3 CLJ 769 CA ***(refd)***

A *PP v. Misbah Saat [1998] 1 CLJ 759 HC* ***(refd)***
PP v. Muhammad Suhaimi Abdul Aziz [2004] 1 CLJ 378 CA ***(refd)***
Rajagopal v. PP [1977] 1 MLJ 6 ***(refd)***

Legislation referred to:
Penal Code, s. 84

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Other source(s) referred to:
Ratanlal and Dhirajlal's Law of Crimes, 5th edn, p 289
Ratanlal and Dhirajlal's Law of Crimes, 25th edn, p 280

For the appellant - JB Singh (Anthony Tai with him); M/s JB Singh & Co
C *For the respondent - Meor Hashimi Abdul Hamid DPP*

[Appeal from High Court, Kuching; Criminal Trial No: CT/KG 1/94(1)]

Reported by WA Sharif

D

JUDGMENT

Abdull Hamid Embong JCA:

E **[1]** The appellant was convicted of murder and was sentenced to death after a full trial heard by the High Court judge sitting with two assessors at the High Court in Kuching, Sarawak on 11 April 1997.

F **[2]** The charge stated that:

> That you, on 16th day of March, 1993 at between 5.30 a.m and 7.00 a.m. at Sebuku, Bau, in the state of Sarawak, committed murder by causing the death of one Jong Liu Chin (f) and you thereby committed an offence punishable under section 302 of the
G Penal Code. (FMS Cap. 45)

[3] We heard this appeal at our sitting in Kuching and dismissed it. We now give our reasons. First, the brief facts:

H 1. On 16 March 1993 ASP Sayang Kavang (PW4) was informed by Sgt. Jien (PW20) about the finding of a corpse at the scene of the crime at Sebuku, Bau. On arrival there PW4 found a headless body donned in a blue colored school uniform with a name tag of "Jong Liu Ching" (the deceased)
I pinned on it. In a school bag found nearby, he also found some books with the name of the deceased written on them.

On the same night, the deceased was sent to the mortuary at the Sarawak General Hospital where a post-mortem was conducted on it.

2. The appellant was arrested on 18 March 1993 and he led the police to the recovery of a knife. Also resulting from his interrogations police recovered a human skull, later determined by PW3, Prof. Dr. Masatsugu Hashimoto, a Professor in Forensic Odontology and Physical Anthropology at the University of Tokyo, to be that of the deceased. The deceased a schoolgirl, aged 18 years was identified by both her parents.

3. Dr. Hajjah Sardar Jehan, a forensic pathologist at the Sarawak General Hospital, in her evidence adduced by deposition (exh. p. 43) stated that she conducted an autopsy on the deceased and stated the cause of death as transaction of the spinal cord due to decapitation of the head. Dr. Sardar Jehan also deposed that upon a vaginal examination of the deceased, she found evidence of sexual intercourse from the large amount of sperms deposited, although there was no evidence of rape.

4. In his cautioned statement, admitted as exh. P51, after the learned trial judge conducted a trial within a trial, the appellant had admitted to killing the deceased at Sebuku, Bau, and then had sexual intercourse with the corpse. He had also stripped off from the deceased her ring, earrings and some money from her purse. In his sworn testimony, the appellant further maintained to killing the deceased on 16 March 1993 at Sebuku Road, Bau. The appellant also admitted to severing the deceased head and carried it away with him. He then peeled off the skin of the head and threw away the skull into a jungle at Kampung Opar, Bau.

5. It was not disputed that the appellant had perpetrated this heinous crime. The only issue now before us was whether the appellant had successfully raised a defence of insanity, which learned counsel for the appellant put forth as the sole ground of appeal for our consideration. We will treat this sole issue under the two grounds on which it was argued, namely,

A (a) That the appellant had on a balance of probability raised a reasonable doubt on the issue of insanity.

6. In his defence, the appellant stated that he had killed the deceased because a certain "Jimmy" had instigated him to do so. Jimmy had asked him to bring the skull to Kampung Opar but he had thrown it into the jungle because he got scared. This part of his evidence is however different from what he had said in his cautioned statement where he admitted to hiding the skull in some bushes. He also said that Jimmy had threatened his life if he did not kill someone and take his head. The appellant stated that he was scared of Jimmy whom he described as a vengeful person. From the witness box, the appellant also said that he was aware of the offence he had committed and felt sorry for the deceased. He further recounted how he had stabbed the deceased's throat with a knife and severed her head. To a question by the learned deputy public prosecutor as to why he had not mentioned about Jimmy in his cautioned statement, the appellant explained that that was because he was scared of Jimmy. The appellant further said that he was not conscious of what he did when he committed the crime and that he could only remember what Jimmy had told him to do. He also asserted that he did not know that his act was an offence or that he would be arrested for it.

7. In support of his defence of insanity the appellant had called Dr. Abang Bennett Taha (DW2) a consultant psychiatrist then with the Sarawak General Hospital. DW2 observed and attended to the appellant from 2 April 1993 to 28 April 1993. DW4 conducted four interviews on the appellant during that period. He also interviewed the appellant's father on 8 April 1993. DW2 found the appellant to be suffering from what he termed as "acute psychotic disorder". He explained that the word 'acute' did not indicate the severity of the appellant's illness. DW2 in his testimony added that by acute psychotic disorder he meant that the appellant was not in contact with reality. There were disturbances in his way of thinking, perception and behaviour. The 'disorder', he said, was almost similar to that of schizophrenia although in acute psychotic disorder the full criteria of schizophrenia are not met. DW2 also said it appeared that the appellant was suffering from that illness since December 1992.

8. From his interviews with the appellant, DW2 found him to be rational and coherent in his speech and showed the appropriate emotional responses when the appellant described the incident of the crime. When DW2 first met the appellant on 2 April 1993 he found the appellant to be in contact with reality, not on any medication and there was no evidence that the appellant was then showing any psychotic symptoms, although he looked depressed.

9. DW2 also opined that the appellant's illness was not the "very serious type, in other words, mild to moderate in severity". He also explained that the appellant did not suffer from a total impairment of his cognitive functions relating to his memory, reasoning and understanding faculties.

10. The law on unsoundness of mind as a complete defence in our criminal jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s. 84 of the Penal Code. It states:

> 84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

11. This section exempts a person found to be insane of any criminal responsibility if it is found that he is "incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law" (see commentary in *Ratanlal and Dirajlal's Law of Crimes,* 25th edn, p 280). The learned authors there further commented that a person "is not protected if he knew that what he was doing was wrong, even though he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know that it was wrong.

12. Thus, under s. 84 Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.

13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s. 84 Penal Code. The specie of insanity addressed by s. 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s. 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes*, 25 edn. p. 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *PP v. Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:

> It is settled law that the defence of insanity under s. 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v. Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *PP v. Misbah bin Saat* [1997] 3 MLJ 495.

14. When the defence of insanity is raised the court thus needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law. (see *Ratanlal and Dhirajlal's Law of Crimes*, 5th edn., p. 289 et seq).

15. It is also settled law that the burden of proof rests on the person who raises the defence of insanity (see *Juraimi bin Hussein v. PP* [1998] 2 CLJ 383 also *Baharom v. PP* [1960] 26 MLJ 249). And it is only the accused person who has this right to raise a defence of insanity. It is not open to the court or the prosecution to raise it (see *PP v. Misbah bin Saat, supra*).

16. The standard of proof upon the accused raising the defence of insanity is on a balance of probabilities, as in a civil case (*Rajagopal v. PP* [1977] 1 MLJ 6, *Goh Yoke v. PP* [1970] 1 MLJ 63). So, if the appellant here is able to show, either from the prosecution or other evidence that he committed the crime but was at that time insane, he cannot be culpable by virtue of s. 84 Penal Code.

17. We therefore need to scrutinize the evidence put forth by the appellant. This came from the testimony of DW2, an expert witness called by the defence at the trial, which had been alluded to earlier in this judgment. The learned deputy public prosecutor had also correctly summarized DW2's evidence and pointed to this court what DW2 had concluded. The relevant conclusions made by DW2 are as follows:

(i) I am of the opinion that his illness is not the very serious type; in other words, mild to moderate severity (p. 407 Appeal Record (AR)).

(ii) In this case, I believe accused understands the nature and seriousness of his act (p. 454 AR).

(iii) In my opinion, he was able to differentiate between right or wrong at the time of the killing (p. 454 AR).

(iv) In my opinion, the accused was able to know (that the act of killing was contrary to law) (p. 454 AR).

(v) In my opinion, he was aware at that time (whether the act of killing was wrong) (p. 454 AR).

(vi) Yes, but not totally impaired (mental faculties of accused) (p. 456 AR).

(vii) Yes, accused was having acute psychosis at the time of killing but the psychosis did not totally impair his cognitive functions ie, memory, judgment, thinking (p. 456 AR).

We observed that DW2's evidence was totally not in favour of the appellant.

A 18. The learned trial judge in his summing-up to the assessors noted that DW2 was a government psychiatrist of some experience and thus qualifies as an expert under s. 45 of the Evidence Act. His Lordship was also of the view that DW2 is an expert in a specialised field and thus his opinion was
B entitled to some weight. We agree.

19. Now, looking at DW2's evidence we come to a finding that the total effect of his opinion was that the appellant was not of unsound mind at the time he committed the offence which
C is the crucial point of time when insanity must be established. We also conclude based on that expert's testimony that the appellant was indeed capable of knowing the nature of his act as being against the law. In our considered view, the appellant was, in short, not insane.

D 20. We have also considered the defence expounded by the appellant in his testimony. In our view the appellant's act in disposing off the skull after severing the deceased's head showed a degree of guilt and an effort to avoid detection. Where insanity is raised as a defence, this court may consider
E the circumstances which come after the crime. This is a material consideration in deciding whether the appellant had satisfied the test laid down under s. 84. The court may take into account such circumstances and any inference of facts to determine if a plea of insanity has succeeded.
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21. We are also perplexed as to why the appellant had not mentioned about Jimmy in either his cautioned statement or to DW2 during the four interviews he conducted on the appellant. No question was also asked on the existence of this
G person by learned counsel of the appellant although this was the main force of the defence. We are of the view that the appellant had made up the existence of this person to spice up his story that he was driven by an insane delusion to commit this crime.
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22. We may add here that DW2 is the appellant's own witness and therefore the unequivocal opinion expressed by him would be binding on the defence. This proposition is now trite as was declared by this court in *Lim Guan Eng v. Public Procecutor*
I [1998] 3 CLJ 769 in the following words of Gopal Sri Ram JCA:

> Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice, there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case. See *M Ratnavale v. S. Lourdenadin* [1988] 2 MLJ 371.

23. Having considered the defence we found that the appellant had failed on a balance of probabilities to prove that he was of an unsound mind at the time he committed this crime, to succeed under s. 84 of the Penal Code.

> (b) That the learned trial judge had failed to properly sum up to the assessors on the matter of the appellant's unsoundness of mind at the time he committed the murder.

24. Learned counsel for the appellant had submitted that the learned trial judge did not explain the technical evidence of DW2 to the assessors in order to ensure that the assessors, who were lay persons, understood the evidence and therefore could properly evaluate the issue of insanity as a defence.

25. We have scrutinised that part of the summing up of the learned trial judge (pp. 608 to 614 AR) and could not find any justification to the appellant's complaint here.

26. The learned trial judge had in his summing up to the assessors properly defined and explained the law on insanity. His Lordship also explained in clear terms the burden of proof required of the appellant in raising this defence. He had also recounted the evidence of DW2 to the assessors and had directed them to view the evidence as a whole to determine whether the prosecution had generally succeeded in proving its case beyond a reasonable doubt.

27. We find that the summing up was undertaken with great care by the learned trial judge and had been impeccable and unimpeachable. We cannot see how the assessors could have misunderstood the summing up or the evidence of DW2. We hold that there has not been any misdirection by the learned trial judge in his summing up. As such this ground of appeal also fails.

A 28. In law, once the prosecution had proven its case beyond a reasonable doubt, as was done in this case, there is a presumption that the accused person was sane at the time he committed the offence (see *Bhikari* AIR [1966] sc. 7). This rebuttable presumption may be refuted either by leading
B evidence or relying on the prosecution own evidence. Our scrutiny of the evidence led us to conclude that the appellant had failed to do either.

[4] For these reasons, we dismissed this appeal and confirm the
C conviction and sentence of the trial court.

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